

Christine Joyce

7/9/ (7)

From: Steve Ledoux
Sent: Wednesday, June 20, 2012 12:07 PM
To: Board of Selectmen
Subject: FW: Regulation of Donation Bins
Attachments: Scan from a Xerox WorkCentre001.pdf

We will agenda this for 7/9

Steven L Ledoux
Town Manager
472 Main Street
Acton, MA 01720
Telephone (978) 929-6611

When writing or corresponding, please be aware that the Secretary of State has determined that most email is a public record and, therefore, may not be kept confidential.

-----Original Message-----

From: Lili Early
Sent: Wednesday, June 20, 2012 12:02 PM
To: Roland Bartl
Cc: Steve Ledoux
Subject: FW: Regulation of Donation Bins

Roland,

Per Steve, attached is the document from A&K.

Lili

-----Original Message-----

From: ATH-MGR-COPIER@acton-ma.gov [<mailto:ATH-MGR-COPIER@acton-ma.gov>]
Sent: Wednesday, June 20, 2012 12:00 PM
To: Lili Early
Subject: Regulation of Donation Bins

Please open the attached document. It was scanned and sent to you using a Xerox multifunction device.

Attachment File Type: pdf

multifunction device Location: Town Hall, First Floor (Manager)
Device Name: ATH-MGR-COPIER

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ANDERSON & KREIGER LLP

MEMORANDUM

To: Steve Ledoux
Town Manager
TOWN OF ACTON

From: Stephen D. Anderson
Timothy J. Roskelley
ANDERSON & KREIGER LLP

Re: Regulation of Donation Bins

Date: June 15, 2012

Got Books, a for-profit company, has been collecting books by placing donation bins around the Town of Acton ("Acton"). Acton is concerned that the bins are misleading because they do not disclose the for-profit status of Got Books. As a result, residents of Acton may erroneously believe they are making donations to a non-profit charity when they are actually giving books for free to a for-profit company. This may cause residents to incorrectly claim tax deductions for their donations and reduce the number of books donated to non-profit charities and the local library.

Acton has asked Anderson & Kreiger to evaluate whether donation bins, such as those used by Got Books, may be regulated and, if so, Acton's regulatory options. We conclude that Acton may regulate donation bins through the adoption of a new town bylaw. Acton would have a range of options for regulation, including:

- sending letters to the owners of for-profit bins requesting voluntarily disclosure;
- a bylaw with relatively simple disclosure requirements for all donation bins or only for-profit donation bins with enforcement mechanisms for non-compliance;
- a bylaw and associated regulations, licensing requirements and enforcement mechanisms that would comprehensively regulate donation bins;
- regulation of only for-profit bins; and
- banning for-profit bins.

These options are not necessarily mutual exclusive and some may be combined.

Legal Principles.

The Legislature has given cities and towns the power to enact ordinances, "as they may judge most conducive to their welfare," G.L. c. 40, § 21, and the only limitation on this power is that

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such ordinances be reasonable and “not repugnant to law.” *Com. v. Lammi*, 386 Mass. 299, 300 (1982). Municipalities may not adopt by-laws or ordinances that are inconsistent with State law. *Boston Edison Co. v. Town of Bedford*, 444 Mass. 775 (2005). If only one class of donation bins is regulated, there must be a rational basis for discriminating among types of donation bins that is related to a legitimate purpose for donation bin regulation. *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 389 Mass. 436, 445-46 (1983).

A bylaw regulating donation bins could meet these minimal requirements. Regulation of donation bins serves a legitimate, reasonable purpose of ensuring that Acton residents seeking to donate to non-profit charities are informed about any for-profit status of companies/organizations providing donation bins. Disclosing this information will reduce the risk that Acton residents will improperly claim tax deductions for donations to for-profit companies and reduce the risk of that residents will mistakenly divert clothes, books and other goods away from non-profit charities and other public resources, such as the Acton library system.

We are not aware of any federal or state regulations specifying disclosure requirements for donation bins. According to a February 9, 2010 press release from the Massachusetts Attorney General’s Office, any company that claims that a portion of the proceeds will be donated to charity must register with the Attorney General’s office as commercial co-venturer and report annually to the Attorney General. Otherwise, the Attorney General does not directly regulate donation bins and advises people to not presume that their donations will be used for charitable causes and to seek information about the companies providing donation bins. Local disclosure requirements would be consistent with the Attorney General’s position and advice.

To the extent that donation bins could be considered signs and advertising, they may be protected under the First Amendment of the United States Constitution as commercial speech. *See e.g. Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980) (regulation of commercial speech permissible where (1) the asserted governmental interest is substantial and (2) the regulation directly advances the governmental interest asserted and is not more extensive than is necessary to serve that interest”). However, in order to avail itself of these protections, the commercial speech “at least must concern lawful activity *and not be misleading*.” *Id.* (emphasis added).

Review of Acton’s Options.

1. Voluntary Disclosure.

Acton could send a letter to Got Books and other for-profit companies with donation bins in Acton requesting that they clearly identify on the bin that they are a for-profit company, that they are not a registered public charity and that books or other goods placed in the bin are not eligible for tax deductions. Additionally, the letter can state that if writing on the bin claims that a

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portion of the proceeds will support charitable organizations or causes, then the company must register with the Attorney General's office as a commercial co-venturer and that failure to do so will result in a complaint from Acton to the Attorney General's office.

This approach is simple and direct. It may prove sufficient to address the identified concern with Got Books, but it would not address the concerns about for-profit donation boxes unless Acton seeks to identify other for-profit companies with donation bins in the town and send the same letter to each company. If such proactive steps are not taken, Got Books may also claim that it is being unfairly singled out. Finally, it does not provide any enforcement mechanism if the letter is ignored.

2. Licensing and Regulation without Enactment of a Bylaw.

No licensing statute that we are aware of, including those in M.G.L. c. 140, authorize licensing of donation bins. Similarly, broad regulation of donation bins does not expressly fall within the existing regulatory power of any Acton board, commission or department. Section 7 of the Acton Zoning Bylaw regulate signs, which could provide an avenue for regulating donation bins. "Signs" include "any symbol, design or device used to identify or advertise any place, business, product, activity, service, person, idea or statement." The degree of regulation would depend on what category of sign donation bins fall into, e.g. movable signs, freestanding signs or wall signs. In any event, regulations through the bylaw would bring all donation bins under the regulation and would not be narrowly tailored to addressing Acton's concerns concerning misleading information.

3. Bylaw Requiring Simple Disclosure and Providing for Enforcement.

Acton could opt for a simple bylaw that (1) defines donation bins, (2) requires certain disclosures to be placed conspicuously on the bin (e.g. entity name, contact information, status as a registered public charity or for-profit company and requirement that claims of charitable donations by for-profit entities may be included only if the entity is registered as a commercial co-venturer) and (3) includes enforcement mechanisms (e.g. tickets, towing or other removal).

4. Bylaw Comprehensively Regulating Donation Bins.

At the other end of the spectrum, Acton could follow the lead of the City of Quincy and adopt a licensing scheme through a new bylaw. The Quincy ordinance includes detailed regulations of donation bins (including restricting placement of bins to certain zoning districts, conformance with setbacks, sight lines and other zoning requirements, specifications of bin types and dimensions and regulation of collection frequency). The ordinance also includes licensing and permitting requirements, including an application detailing the person or entity applying for the license, the payment of a \$150 fee and attaching a permit that includes the name and telephone

number of the person or entity operating the bin. The Quincy ordinance does not require additional information, such as whether the person or entity is registered with the Commonwealth as a public charity or a commercial co-venturer.

5. Bylaw Regulating Only For-Profit Bins

If for-profit donation bins are singled out, there must be a rational basis related to the legitimate purposes identified for regulation. Acton could tailor a bylaw to limit regulation to entities that are not registered as public charities with the Commonwealth. The rational basis for this is that maintenance of donation bins by for-profit organizations can be misleading, but it is not misleading if the organization is a registered public charity. This would also avoid placing additional, unnecessary burdens on public charities. While we believe this would be a rational basis that the courts would ultimately uphold, discrimination of any kind may invite litigation. Accordingly, a bylaw that requires disclosures on all donation bins would reduce the risk of litigation and associated expenses. It would also make enforcement easier. If public charities are not required to make a disclosure, then detecting for-profits violating the policy will be difficult since Acton will not know, without making an investigation, whether the bin is owned by a public charity. Requiring a minimal disclosure on all bins would address this concern.

Acton could also consider banning for-profit bins. While a ban could also be justified under the same rationale as above, less restrictive means are available and an outright ban would be more likely to invite a legal challenge. It would also have the same identification problems discussed above.

Conclusion.

Acton may regulate donation bins to protect the public from potentially being misled. Acton has a number of options for regulation, from minimal disclosure requirements on for-profit entities to comprehensive licensing or permitting. Wherever Acton wishes to be along this spectrum, we would be happy to assist in drafting the appropriate bylaw.